IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2017

CORAM

THE HON'BLE MR. JUSTICE NOOTY. RAMAMOHANA RAO
and
THE HON'BLE MR. JUSTICE M.DHANDAPANI

W.A. No.874 of 2017
and
C.M.P.No.12215 of 2017

M/s.Vithayathil Cements rep. by its
Proprietor Tony Thamas rep. by his
Power Agent K.P.Venugopal .. Appellant/Petitioner

Vs.

1.Principal Secretary,
The Managing Director,
M/s.Tamil Nadu Cements
Corporation Ltd.,
735, L.L.A. Buildings,
2nd Floor, Anna Salai,
Chennai - 2.

2.The General Manager (Marketing),
M/s.Tamil Nadu Cements
Corporation Ltd.,
735, L.L.A. Buildings,
2nd Floor, Anna Salai,
Chennai - 2. .. Respondents

Appeal filed under Clause 15 of the Letters Patent to set aside the order dated 25.05.2017 made in W.P.No.12388 of 2017.

Prayer in WP.No.12388 of 2017: Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records of the cancellation of agreement in Letter TANCEM / CO / MKG / C.A / South / kerala / 2017 dated 03.05.2017 passed by the 1st respondent and quash the same and consequently direct the first respondent to restore the Supply of Arasu Cements to the petitioner till the agreement period i.e. 03.03.2017 to 02.03.2019.

For Appellant .. Mr.K.Kumar, Sr. Counsel
for M/s.B.L.Jayakandan

For Respondents .. Mr.K.Venkatramani,
Addl. Advocate General
for Mr.P.S.Sivashanmugha Sundaram,
Spl. Govt. Pleader

JUDGMENT

(Judgment of the Court was delivered by NOOTY. RAMAMOHANA RAO,J.)

This in-house appeal has been directed against the judgment and order rendered by our learned brother Justice M.M.Sundresh on 25.05.2017 dismissing the writ petition with liberty to proceed in terms of Clauses 43 and 44 of the agreement between the parties.

2.Mr.P.S.Sivashanmugha Sundaram, learned Special Government Pleader accepted notice on behalf of the respondents though the company itself has not been impleaded, which ought to have been.

3.The writ petitioner/appellant is a firm solely owned by an individual, who is carrying on business in sale of cement, having effective distribution net work in several Districts of the adjoining State of Kerala. Tamil Nadu Cements Corporation Limited is a Government of Tamil Nadu undertaking (henceforth referred to as 'the company'). There is no doubt that it answers the description of the expression “State” for the purpose of Article 12 and for purposes of Part III of the Constitution of India. It has entered into an agreement with the writ petitioner/appellant on 03.03.2016 accepting the offer of the writ petitioner/appellant to act and function as a 'consignment agent' of the said company. The company has two manufacturing units situated at Alangulam in Virudhunagar District and Ariyalur in Ariyalur district. Hence the cement of various grades manufactured by the company is sought to be marketed through the writ petitioner/appellant- consignment agent. The terms and conditions of the said agreement have been reduced to writing and important amongst them is that liberty has been preserved to the company to despatch certain quantities of various grades of cement manufactured by it from time to time and that it has also right to insist upon the consignment agent to sell around 5000 metric tonnes per month and liberty to fix the target for the sale of such products has been retained by the company. The company has also reserved the right to sell cement to any institution, Government Department, Semi or Quasi Government Department, bulk consumers other than traders either directly or through any of their authorised agents of the company and the consignment agent shall not claim any commission on such sales unless otherwise the consignment agent has made any special efforts/co-ordination to procure such orders. The consignment agent shall submit a Bank Guarantee for a value of Rs.1,50,00,000/- or equivalent amount to be deposited with the company or partly covered by Bank Guarantee and partly by cash deposit. The amount deposited with the company will carry interest at the rate of 6% per annum. It is also agreed that the company shall not supply cement more than the value covered by the Bank Guarantee/cash deposited at any point of time. Clause 38 of the agreement has specified that the consignment agreement shall be in force with effect from 03.03.2016 valid upto 02.03.2017 for a period of one year and that it is renewable subject to the satisfaction of the company and good and proper performance of consignment agent and on mutual terms settled. Clause 39 vested power in the hands of the company to terminate the agreement forthwith without any notice on the happening of any of the events specified in sub clauses a to g thereof. Clause 42 has specified that the agreement can be terminated by ignoring 30 days notice in advance by either side. On 07.09.2016, the company has intimated the consignment agent - writ petitioner/appellant that his account was showing debit balance of more than Rs.4.83 crores and because of these huge arrears, the company is facing critical fund crunch.

4.Notwithstanding the huge arrears, the company, by its communication dated 06.03.2017 accepted the offer of the consignment agent - writ petitioner/appellant to extend the period of agreement from 03.03.2017 to 02.03.2019 by a further period of two years. Accordingly, another agreement has been entered into by and between the parties on 07.03.2017. On 03.05.2017, without putting the consignment agent - writ petitioner/appellant on notice, the company cancelled the consignment agency for South Kerala with effect from 24 April 2017. That triggered the writ petition. The learned single Judge has dismissed the writ petition essentially on the ground that there was an effective alternative remedy available to the consignment agent - writ petitioner/appellant in Clauses 43 and 44 of the agreement referred to supra. Under Clause 43, it is agreed by and between the parties that any dispute will be subject to the jurisdiction of the Courts having jurisdiction in Madurai High Court to the exclusion of all other courts whereas in Clause 44, the alternative mechanism of dispute resolution in the form of settlement and arbitration in accordance with the provisions contained in Arbitration and Conciliation Act, 1996, have been provided for. Hence the learned single Judge dismissed the writ petition preserving liberty to the writ petitioner/appellant to enter into an amicable settlement or take recourse to resolution of existing dispute by way of arbitration and hence dismissed the writ petition. It is against this order, the present appeal is preferred.

5.We have heard Mr.K.Kumar, learned senior counsel, who appeared on behalf of the appellant on 27.07.2017 and today, we had also heard Mr.B.L.Jayakandan, learned counsel for the appellant for considerable length of time.

6.The company no doubt answers the description of "State" for the purpose of Article 12 of the Constitution of India. But, however, when it seeks to enter into a consignment agreement for sale and distribution of its cement products, it is entering into any such agreement as any other private manufacturer/cement industry would have done. The contract so entered by the company is for all practical purposes and content is a private contract as part of carrying on with its business activity. The disputes relating to ordinary contracts are not normally liable to be agitated and resolved in a proceeding under Article 226 of the Constitution of India as was laid down by the Supreme Court in Bareilly Development Authority Vs. Ajai Pal Singh ((1989) 2 SCC 116), State of Uttar Pradesh Vs. Bridge & Roof Co. (India) Ltd., ((1996) 6 SCC 22), State of Bihar Vs. Jain Plastics and Chemicals Limited ((2002) (1) SCC 216), National Highways Authority of India Vs. Ganga Enterprises ((2003) 7 SCC 410) and in Assistant Excise Commissioner Vs. Issac Peter ((1994) 4 SCC 104). It will also be important to notice that the Supreme Court in Kerala State Electricity Board and another Vs. Kurien E.Kalathil and Others ((2000) 6 SCC 293), in paragraphs 10 and 11, enumerated the principles on the subject. In this context, it would also be appropriate to notice the features of a statutory contract as were laid down by the Supreme Court in India Thermal Power Ltd., Vs. State of Madhya Pradesh ((2000) 3 SCC 379), as under:

> "Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties."

7.We may also notice that the Supreme Court in State of Kerala and Others Vs. M.K.Jose ((2015) 9 SCC 433) after reviewing its earlier judgments rendered in Gunwant Kaur Vs. Municipal Committee, Bhatinda ((1969) 3 SCC 769) and ABL International Ltd., Vs. Export Credit Guarantee Corpn. of India Ltd., ((2004) 3 SCC 553) and Noble Resources Ltd., Vs. State of Orissa ((2006) 10 SCC 236), in para 29, it has been held that each case must be decided on its own facts while public interest may be one of the factors to exercise the power of judicial review or where the public law element is involved, such judicial review exercise may be legitimate, but not when there are serious and disputed questions of fact which require resolution upon collection of evidence.

8.As was noticed by us supra, the dispute raised by the writ petitioner/appellant centers around Clauses 37, 39 and 42 of the agreement entered into by and between the parties on 07.03.2017. It is only appropriate that the contents of these aforementioned clauses are virtually same as are contained in the agreement dated 03.03.2016 entered into by and between the parties. We also bear in mind particularly the communications sent up by the company to the writ petitioner/appellant on 07.09.2016 that his account was overdue by a little more than Rs.4.8 crores and also the communication dated 24.09.2016 representing the terms, agreed upon in the minutes of the meeting held between the parties on 09.08.2016 with regard to repayment of money and finally on 16.12.2016, the overdue amount has gone beyond Rs.5.6 crores and the failure on the part of the writ petitioner/appellant in remitting the sale proceeds of cement to the company is causing huge financial hardship to the company in question. These and other similar factors make the question of termination of the agreement a seriously disputed one and questions such as who is at fault and who committed the breach of contract at the first instance are liable to be decided upon collection of evidence, which includes both oral and documentary. We are therefore of the opinion that the proceedings under Article 226 of the Constitution of India are ill-suited for resolution of such factual controversies.

9.The learned single Judge, in our opinion, is right in preserving liberty to the parties to workout and secure settlement of the inter se disputes by taking recourse to the alternative disputes resolution mechanism contemplated and provided for in the agreement itself. The learned single Judge, in our opinion, has rightly exercised his discretion not to entertain the writ petition and having found no error in exercise of the jurisdiction by the learned single Judge, we dismiss this writ appeal at the admission stage. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mmi

To

1.The Principal Secretary,
The Managing Director,
M/s.Tamil Nadu Cements
Corporation Ltd.,
735, L.L.A. Buildings,
2nd Floor, Anna Salai, Chennai - 2.

2.The General Manager (Marketing),
M/s.Tamil Nadu Cements
Corporation Ltd.,
735, L.L.A. Buildings,
2nd Floor, Anna Salai, Chennai - 2.

+1cc to the Government Pleader SR.No.55751
+2cc to Mr.B.L.Jayakanden, Advocate SR.No.54755

W.A.No.874 of 2017

PPA(CO)
GN(18/08/2017)